No. 14,519

United States Court of Appeals

For the Ninth Circuit

WILLIE STANTON and MILDRED C. STANTON,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the District Court for the District of Alaska, Fourth Division.

BRIEF OF APPELLANTS.

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The facts leading to this appeal are as follows:

The primary case was styled *United States of America v. Dwight Robinson,* No. 1815 Criminal, in which said Dwight Robinson was found guilty of the crime of larceny and was sentenced by the Honorable Harry E. Pratt, District Judge of the District of Alaska, 4th Division, Fairbanks, Alaska, to three-and-one-half (3½) years in an institution to be designated by the Attorney General. The defendant, Dwight Robinson, appealed from this sentence and commitment on the 4th day of January, 1954 (Tr. 67) and on the 2nd day of February, 1954, a supersedeas undertaking was executed by appellants Willie Stanton and Mildred C. Stanton in the sum of $5,000.00.

On the 4th day of February, 1954, John B. Hall, Clerk of the District Court, District of Alaska, 4th Division, Fairbanks, Alaska, directed a letter (Tr. 29-30) to the Commanding Officer of the 450th AAA Battalion, Eielson Air Force Base, Alaska, in reply to an inquiry regarding the status of the case of the *United States of America v. Dwight Robinson;* and in this letter the Commanding Officer of the said battalion was advised that on December 29, 1953, Dwight T. Robinson was sentenced to serve a term of three-and-one-half years for the crime of larceny, but that on January 4, 1954, a notice of appeal was made to the U. S. Circuit Court of Appeals, San Francisco, California, and on the 2nd day of February, 1954, Dwight Robinson had been released on a $4,500.00 supersedeas bond.

On the 2nd day of March, 1954, Dwight Robinson was forcibly flown by the Army to Fort Lewis, Washington, where he was duly separated from the Armed Forces, with the sum of $10.00 as separation pay, that thereupon Dwight Robinson managed to secure a loan of $30.00 from his mother to go to Niagara Falls, New York, where his sister resided. On the 31st day of March, 1954, the Court of Appeals dismissed the appeal of Dwight Robinson and notice was given to his attorney to have the defendant appear for commitment on the 4th day of June, 1954.

After dismissal of the appeal, efforts were made to contact Dwight Robinson and it was discovered at that time that he had been forcibly removed by the

Army from Alaska to the Continental United States for separation from the Armed Services.

Communications were transmitted to Dwight Robinson that his presence was required in Fairbanks, Alaska, and correspondence was received from Dwight Robinson to his attorney, Warren A. Taylor, to the effect that he had no funds with which to return to Alaska and also stated in his letter that he had asked the Army officers to allow him to contact his attorney, Warren A. Taylor, so that he could be notified that he was being forcibly returned to the Continental United States, but this request was refused by Army officers (Tr. 27-28.)

That defendant's attorney, Warren A. Taylor, informed the U. S. Attorney at Fairbanks, Alaska, of defendant's whereabouts so that he could be returned to Fairbanks for sentencing. Dwight Robinson was then taken into custody in his home at West Virginia and returned to Fairbanks, Alaska, for the imposition of the sentence of the District Court. That at the time the defendant was taken into custody in West Virginia, the bondsmen were making arrangements to fly the defendant back to Fairbanks from West Virginia. On the 26th day of July, 1954, the supersedeas undertaking was declared forfeited by the District Court for the District of Alaska, 4th Division, Fairbanks, Alaska, a reconsideration of the motion for the remission of the bond was had on August 6, 1954, wherein the Court affirmed the decision of July 26, 1954, and on August 12, 1954, notice of appeal from

this judgment was filed with the Clerk of the District Court, District of Alaska, 4th Division, Fairbanks, Alaska.

STATEMENT OF POINTS.

The appellants herein state the points upon which they intend to rely on this appeal are as follows:

1. The Court erred in overruling the bondsmen's motion for remission of the bond.

2. That the order of the Court was contrary to law.

3. That the order of the Court was contrary to the evidence.

In respect to the first point relied upon, the Court should have given consideration and considerable weight to the affidavit of Dwight Robinson's attorney with respect to the forcible removal of Dwight Robinson from the Territory of Alaska by the U. S. Government for separation from the Military Services at Fort Lewis, Washington. The fact that Dwight Robinson was taken from the jurisdiction of the District Court, Territory of Alaska, by an agency of the U. S. Government, and which in fact put him beyond the reach of the District Court and unavailable for an appearance before that Court, should receive great consideration from this Court.

In respect to the second point relied upon, it is contended by the appellants that under the applicable Alaska statute, Section 66-17-52, Alaska Compiled Laws Annotated, 1949, entitled "Discharge of For-

feiture—That, if, at any time before adjournment of the Court, the defendant appear and satisfactorily excuses his neglect or failure, the Court may direct the forfeiture of the undertaking or deposit to be discharged, upon such terms or justice . . .", and in the Federal Rules of Criminal Procedure, Rule 46 (f) (2), "The Court may direct that forfeiture be set aside, upon such conditions as the Court may impose, if it appears that justice does not require the enforcement of forfeiture . . ." In *State v. Fong,* 79 Wash. 68, 139 Pac. 647, the facts of the case are not wholly unlike the case at bar. In *State v. Fong,* supra, the bail was forfeited at the time he did not appear because his attorney had advised him that a Motion to Dismiss the action would be granted, and that it would not be necessary for him to appear on that date. In the case at bar Dwight Robinson knew that his case was being appealed and while acting under this assumption that his case was under appeal, he was forcibly removed by the United States Government to the Continental United States, where he was separated from service. It must be borne in mind that the defendant informed his attorney where he was, his penniless state, and his desire to return for sentence. In *State v. Fong,* supra, it is said, "on these facts it was held to be error to deny the application to vacate, on just terms, the order of forfeiture." Appellants have no argument that upon wilful default of the principal, remission in part or in whole would not be granted. However, we have no showing of the lack of wilfulness on the part of the principals on the bond.

Under Rule 46, Federal Rules of Criminal Procedure, in the case of the *United States v. Burl,* 67 F. Supp. 583, "Bail will be exonerated where performance of conditions are rendered impossible by act of God, act of obligee, or acts of the law." In the present instance defendant was removed from Alaska by the obligee on the bond, to-wit, the United States of America, acting by and through the U. S. Army.

In 6 Am. Jur. at page 144, it is said:

> "In respect of the liability of the surety on a bail bond, the imprisonment of a citizen by legitimate orders of a military commander has the same force and effect as if he were confined upon a proper warrant from a civil tribunal. The mere circumstances of military service of the principal is not sufficient to secure the benefit of the statutes (The United States Soldiers and Sailors Civil Relief Act of 1940, as amended October 6, 1942, 56 Stat. Chapter 581), but it must appear that the military service prevented the bondsmen enforcing the attendance of the principal."

In respect to the Third point relied upon, we respectfully call the Court's attention to the uncontradicted affidavit of Warren A. Taylor (Tr. 28) with reference to the letter obtained from the Staff Judge Advocate's office, from Major Clark of the 4th AAA Battalion, Eielson Air Force Base, to Captain Damron stating that, with complete knowledge that Dwight Robinson had appealed to the Court of Appeals for the 9th Circuit from the judgment rendered in Criminal Case 1815, USARAL directed that Robinson be returned to the Z.I. for separation. Dwight Robinson

was then placed on Special Orders dated 5 February, 1954, and departed this station, Eielson Air Force Base, on March 2nd, 1954, and that this in and of itself is sufficient to show to this Court that an agency of the Government had assumed jurisdiction of Dwight Robinson and forcibly removed him from the jurisdiction of the District Court, Fairbanks, Alaska, and from the sureties residing therein.

It is the appellants' contention that defendant, Dwight Robinson's nonappearance was not wilful, but was caused by the United States Army's forcible removal of Dwight Robinson from Alaska and that Decree of Forfeiture be herein set aside.

ARGUMENT.

The District Court, without any showing of lack of wilfulness on the part of the principals on the bond now set aside the forfeiture "upon such conditions as the Court may impose if it appears that justice does not require the enforcement of the forfeiture." This, of course, is a great liberalization in favor of the obligor on the bond of the old requirement.

Federal Rules of Criminal Procedure, Rule 46, (Bail), Subdivision S (Forfeiture):

> 1. *Declaration.* If there is a breach of condition of a bond, the District Court shall declare a forfeiture of the bail.
>
> 2. *Setting Aside.* The Court may direct a forfeiture be set aside, upon such conditions as the Court may impose, if it appears that jus-

tice does not require the enforcement of the forfeiture.

In *U. S. v. Legg,* 157 Fed. Reporter, 2nd Series, 990, the Court said:

> "Bail will be exonerated where performance of the condition is rendered impossible by the act of God, act of the obligee or act of the law."

It also states in *U.S. v. Burl,* D.C. of Illinois, 67 F. Supp. 583, and in *U. S. v. Feely,* Fed. Case No. 15,082, 1 Brock 255, that

> "Where a recognizance to appear for trial is forfeited, but the accused appears at a subsequent term, the Federal Court may suspend the recognizance for good cause shown by the accused why he did not comply with the conditions."

In *Taylor v. Taintor,* 83 U.S. 366, the Court said,

> "If principal who is charged with crime and released on bail is arrested in a state where bail is given and sent out of state by the Governor, upon requisition of Governor of another state, performance of condition of bail is rendered impossible by an act of the law, and hence bail will be exonerated."

In *Joelson v. U. S.,* Circuit Court of Appeals of New Jersey, 287 F. 106, it was stated,

> "A bail bond is a contract between the Government on the one side and the principal and surety on the other."

It is apparent from the facts of this case and the law as set forth in the statutes of Alaska and the Fed-

eral Rules of Criminal Procedure that the appellants should prevail in this matter as all of the elements leading to that conclusion are very apparent in the case at bar.

There were bondsmen or sureties for Dwight Robinson, who was stationed in Alaska and a member of the Armed Forces of the United States. That he was released on bond. That although the officers of the Armed Forces of the United States knew that Dwight Robinson was to appear before the District Court for the District of Alaska, 4th Division, they forcibly removed him from the jurisdiction of the said Court and from the jurisdiction of the bondsmen or sureties, and thereby by an act of law the obligees on the bond rendered it impossible for the said sureties or bondsmen to produce Dwight Robinson before the District Court at the time and at the place prescribed by order of the Court, and that consequently the order of the District Court forfeiting the bond of the appellants herein should be reversed and the bond be exonerated.

Dated, Fairbanks, Alaska,
April 29, 1955.

Respectfully submitted,
TAYLOR, MILLER & TAYLOR,
By WARREN A. TAYLOR,
Attorneys for Appellants.